

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1413

To be argued by
MICHAEL Q. CAREY

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1413

UNITED STATES OF AMERICA,

Appellee

—v.—

LOUIS SANTOS, a/k/a "Louie The Chink",
Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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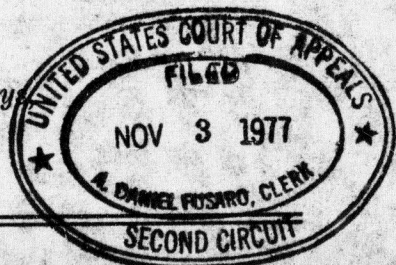




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UNITED STATES OF AMERICA,

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LOUIS SANTOS, a/k/a "LOUIE THE CHINK",

Defendant-Appellant,

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Louis Santos, a/k/a "Louie the Chink," appeals from a judgment of conviction entered on May 20, 1977, in the United States District Court for the Southern District of New York, after a ten day trial before the Honorable Charles M. Metzner, United States District Judge and a jury.

Indictment 77 Cr. 135, filed February 18, 1977, in four counts, charged Louis Santos, a/k/a "Louie the Chink," Salvatore Scudiero, a/k/a "Sally," Joseph Pecorino, a/k/a "Joe Peck" and Joseph Anthony Salvato, a/k/a "Junior" ("Joseph Salvato"), in Count One with a conspiracy to violate the civil rights of Anthony Finn, an informant for the United States Department of Justice, Drug Enforcement Administration ("DEA") and a prospective federal witness, thereby causing his death, in violation of Title 18, United States Code, Section 241. Count

Two of the indictment charged the same defendants with obstruction of justice in that they prevented Anthony Finn from communicating to the DEA information about violations of the federal narcotics laws by Louis Santos, Joseph Salvato and others, in violation of Title 18, United States Code, Sections 1510 and 2. Count Three of the indictment charged Philip George Felice, a/k/a "Phill", and Carlos Cabrera, a/k/a "Carl," with assisting Louis Santos, Salvatore Scudiero and Joseph Pecorino to prevent their apprehension, trial and punishment, in violation of Title 18, United States Code, Section 3. Count Four of the indictment charged Salvatore Scudiero with using a firearm to commit, and with carrying a firearm unlawfully during the commission of, the offenses set forth in Counts One and Two of the indictment, in violation of Title 18, United States Code, Section 924(c).

Trial commenced on May 9, 1977 against Louis Santos, Joseph Pecorino and Philip Felice.* On May 20, 1977, the jury convicted Louis Santos on Count One of the indictment and acquitted Santos and Pecorino on Count

* At the commencement of trial, Salvatore Scudiero was a fugitive. He was arrested and arraigned on the charges in the indictment on August 8, 1977 and his trial is scheduled for November 28, 1977. On the eve of trial, Joseph Anthony Salvato entered a plea of guilty to Count Two in the indictment and agreed to cooperate with the Government. Salvato testified at the trial on behalf of the Government and is Expected to testify in late November at the trial of Salvatore Scudiero. Salvato's sentence has been adjourned without date.

Carlos Cabrera was granted a separate trial on April 29, 1977. Thereafter, he was called by the Government as a witness at the trial of Louis Santos, was granted immunity from prosecution by an order of Judge Metzner and refused to testify. Judge Metzner ordered the Government to charge Mr. Cabrera with criminal contempt and on May 19, 1977, Mr. Cabrera was charged with criminal contempt in violation of Title 18, United States Code, Section 401(3). His trial on these charges is scheduled to begin on November 14, 1977.

Two. In addition, the jury acquitted Pecorino of the charges in Count One and Felice of the charges in Count Three.

On July 11, 1977, Judge Metzner sentenced Louis Santos on Count One to six years imprisonment.

Louis Santos is currently serving the sentence imposed by the District Court.

Statement of Facts

The Government's Case

A. Synopsis

The evidence in this case depicted the gruesome murder of a DEA informant, Tony Finn. In his capacity as an informant, Finn had been negotiating with the defendants Louis Santos and Joseph Salvato, among others, for purchase of cocaine. After he concluded that Finn was an informant, Santos initiated a series of events that ended with Finn's death.

The scenario began on the night of March 4, 1974 when upon Santos' direction, Joseph Salvato brought Finn to the Alley Cat, a bar on the lower East Side of Manhattan. Shortly after his arrival, Finn was assaulted by Santos and two others, Salvatore Scudiero and John Vasquez. Thereafter, a second beating was administered by Santos, Scudiero and Joseph Pecorino. Finn lapsed into unconsciousness. When he recovered consciousness, he made a desperate attempt to escape by diving through a plate glass window. Scudiero then shot Finn once through the head. Finn died immediately. Scudiero and Santos, aided by Pecorino, disposed of the body.

B. Santos Concludes that Finn is an Informant

On July 2, 1973, following a series of narcotics negotiations between Tony Finn and Thomas Petito, Petito was arrested as he was delivering 1/8 of a kilogram of cocaine to Finn. (Tr. 57-60).^{*} In February 1974 approximately two weeks before the date of Finn's death, Louis Santos told Joseph Salvato, each of whom had sold narcotics to Finn between November 1973 and February 1974, that Petito had said Finn was an informer for the DEA. (Tr. 935-36).^{**}

A few days before Finn was killed, Benjamin Rosado, a good friend of Louis Santos, told Tony Finn that Santos was upset that Finn didn't keep his appointment with him and that Finn had not paid Santos all the money he owed him. Finn replied that he would pay Santos what he owed. (Tr. 308-13). Shortly afterwards, Rosado reported to Santos the results of his meeting with Finn and Santos told Rosado that Finn was an informer and that he would get a beating. (Tr. 13).

C. Santos Sets up the Murder Scene

On the night of Tony Finn's murder, Salvatore Scudiero met Salvato, Rosado and Santos at Separate Tables, a bar at Third Avenue and 26th Street in Man-

^{*} Citations preceded by "Tr." refer to pages of the transcript of trial. Citations preceded by a date, e.g., "3/1/77 Tr." refer pages of the transcript of a pre-trial conference.

^{**} Virtually all the narcotics transactions between Finn and Santos Salvato and Vasquez were reported to the DEA by Finn or were witnessed in part by the DEA. In addition, Salvato and Vasquez each confirmed their own sales of narcotics to Finn and through admissions of Santos reported by Vasquez and Rosado, confirmed certain of the sales by Santos to Finn or to themselves. (Tr. 60-69, 73-76, 149-155, 169-175, 313, 630-34, 934).

hattan. (Tr. 314-15). Santos invited Rosado and Salvato into the men's room where Santos told Salvato that Finn was an informer and that he wanted to see him later that night in the Alley Cat. Salvato said that he did not believe Finn was an informer. Santos nevertheless insisted that Salvato bring Finn to the Alley Cat that night, claiming that Finn owed Santos some money for cocaine. (Tr. 315-16, 936-38).

Shortly thereafter, Salvato left Separate Tables and joined Tony Finn at Ruby's, a bar located on 52nd Street between Third and Lexington Avenues. (Tr. 78-79, 939). While they were in Ruby's, Finn introduced Salvato to Special Agent Red Sheehan who was then acting in an undercover capacity as a narcotics buyer. A short time later, as Salvato and Finn were planning to leave Ruby's, Sheehan overheard Salvato teasing Finn about Thomas Petito's belief that Finn was an informant. Salvato said, "Here comes Little Tommy." Finn jumped back, looked around guardedly and then said to Salvato, "Don't start, don't start." (Tr. 176-77).

From Ruby's, Finn and Salvato proceeded to Butch's Place, an after-hours social club located at Avenue A and 13th Street, only a few blocks from the Alley Cat. They stayed there only a short while and then went over to the Alley Cat. Salvato never told Finn of the meeting he had earlier that evening with Louis Santos in Separate Tables or that Santos told him that Finn was an informant. Salvato merely told Finn that Santos wanted to see him about the money that Finn owed Santos. (Tr. 940-41).

D. Finn is Murdered

When Salvato and Finn entered the Alley Cat, a number of persons were already there: Santos, Scudiero, John Vazquez, Carlos Cabrera, the bartender, and Philip Felice, the manager of the bar.

Benjamin Rosado and Patty Huston were in the basement of the bar planning a robbery of a check cashing business.* While planning the robbery, they were snorting cocaine and taking target practice with their revolvers. (Tr. 319-21, 646, 941).

Shortly after he arrived, Finn was jumped by Vasquez, Scudiero and Santos. Santos drew a .45 caliber revolver and fired a shot in the direction of Finn's head, missing him. Scudiero and Vasquez then knocked Finn to the floor, kicking and punching him after he was down. During the fight, a .357 magnum revolver which Finn was carrying fell from his waistband and was picked up by Scudiero. When the fight ended, Finn was dragged to a nearby table and propped in a chair not far from the bar, and Salvato tried to obtain an assurance from Scudiero that nothing further would happen to Finn. Scudiero told Salvato to mind his own business. Salvato repeated his plea to Santos who told him to leave the bar and that nothing would happen. (Tr. 652, 941-43, 989-90).

When the fight with Finn first began, Scudiero pulled Vasquez, a much smaller man, away from Finn. Vasquez became incensed at Scudiero's gesture and, when the fight ended, approached Santos and asked him who Scudiero thought he was. Santos ignored Vasquez' complaint and replied, in Spanish, that Finn was an informant and that Vasquez should take his girlfriend and get out of the bar. (Tr. 652). Thereafter, Santos cleared everyone else out of the bar, leaving only Scudiero, Finn, Carlos Cabrera and Philip Felice. (Tr. 943).

Sometime after Vasquez and Salvato left the Alley Cat, Joseph Pecorino entered the bar, as did Benjamin

* Huston was at that time, and is still today, an escapee of the Federal House of Detention at West Street and one of the FBI's ten most wanted fugitives.

Rosado and Patty Huston who were returning from the basement. Finn was still sitting at a table, obviously suffering the effects of a beating. (Tr. 315-22). Within minutes, Santos took a drink over to Finn's table and when he placed it down, Santos and Finn exchanged words. Finn stood up and Santos slapped him in the face, provoking a second assault on Finn. Santos, Scudiero and Pecorino proceeded to punch and kick Finn even after he had fallen to the floor, stopping only when Finn became motionless. While he was punching and kicking Finn, Santos called Finn an informant in a manner loud enough to be heard by Rosado at the bar. (Tr. 462).

Within a few minutes after the assault stopped, however, in a desperate attempt to save his own life, Finn jumped to his feet, ran towards the door, and leaped head first into the plate glass, wire mesh window in the center of the door, shattering the glass but coming to rest after getting only half way out of the bar. While Finn was hanging in the window frame of the door, Scudiero grabbed him from behind and pulled him back into the bar. Finn and Scudiero exchanged words and Scudiero fired one bullet through Finn's brain, killing him instantly. (Tr. 322-28).

Santos, Scudiero and Pecorino then went into action to dispose of the body. Santos directed Pecorino to get Finn's car and drive it to the curb in front of the Alley Cat. Within a short time thereafter, Pecorino re-entered the bar. Rosado and Huston left the bar first and signaled Santos and Scudiero that everything was clear. Santos and Scudiero then carried Finn's body out of the Alley Cat, threw it behind the seat of Finn's automobile and drove Finn's car to the corner of 9th Street and Avenue A where Finn's body was found at daylight. (Tr. 328, 803-04).

E. The Defendants Discuss the Murder

Within two days after Finn's death, Rosado returned to the Alley Cat and spoke to Philip Felice, the manager of the bar. Felice told Rosado to speak to his best friend, Santos, and tell Santos not to talk about the killing because it could result in life imprisonment. (Tr. 338-39). Only a matter of days thereafter, Rosado told Santos not to talk about the murder and Santos responded that, while as a result of the murder he had lost \$3,000 owed to him by Finn, Finn was an informer. (Tr. 336-37).

Salvato also spoke to Santos after the murder. Within two to four weeks after Finn's death, Santos told Salvato, who had asked what happened to Finn, that Finn had jumped through a window and that Scudiero had to shoot him afterwards. After Santos' arrest in this case and before the trial, while each of them was in prison, Santos repeated essentially the same story to Salvato. (Tr. 945-46).

The Defense Case and Government Rebuttal

Each defendant on trial offered evidence in his defense. The manager of the bar, Philip Felice, testified that all the Government's eye-witnesses had lied about the events surrounding Tony Finn's death. (Tr. 1349-50). He stated that he was on duty the night of March 4th and the early morning of March 5th, 1974, at the Alley Cat until the bar closed at approximately 2:30 a.m., that neither Santos nor Pecorino entered the bar that evening and that Tony Finn did not return to the bar after 11:00 p.m. on March 4, 1974. (Tr. 1338, 1356). The Government had called Detective Thomas McGuinness who had investigated Finn's death for the New York City Police Department and who interviewed Felice in the Alley Cat on the evening following the murder. At the time of the interview, McGuinness showed Felice a photograph

of Finn and Felice claimed that he did not know who it was. To refute this testimony, Felice called a private investigator, Ralph Addonizio, and Chester Mirsky, the attorney for Carlos Cabrera, the defendant. Each of them testified that they had interviewed Detective McGuinness prior to trial and that he could not recall the details of his interview with Felice as he had recalled them during his testimony.* (Tr. 1290, 1326).

Pecorino attempted to establish an alibi for the period of time encompassing the date of March 4 and the early morning of March 5, 1974 but he did not testify himself. He claimed that during the hours of the murder he had been hospitalized in the tuberculosis ward of the Veterans Administration Hospital located approximately 12 blocks from the Alley Cat and he called employees of the hospital in an effort to establish this. Although none of the witnesses for Pecorino had any personal knowledge that Pecorino was in the hospital on the evening of March 4 and 5, 1974, they testified that if he had left the hospital on the night of Finn's murder, the hospital records would have indicated his absence. To rebut this testimony, the Government called a nurse who had made entries in the medical records of Mr. Pecorino which reflected that between 7:00 p.m. on March 4, 1974 and approximately 11:00 a.m. on March 5, 1974, Pecorino was not at his bed or not on the ward at the time appointed for him to receive prescribed medication. In addition, the Government introduced evidence that a patient could enter and exit the hospital on occasion without ever being challenged. (Tr. 1467, 1474-75).

* When Felice testified, he admitted that he in fact, did have a conversation with McGuinness at the time and place where McGuinness said they met. Still Felice denied having said what McGuinness remembered. He explained that he told McGuinness that he did recognize the man in the photo and that he knew him by the name of Tony Irish. (Tr. 1345-47).

Finally, Santos introduced into evidence a parking ticket found in the glove compartment of Finn's car to corroborate Felice's testimony that Finn had received the ticket at approximately 11:55 p.m., March 4, 1974 at a place immediately in front of the entrance to the Alley Cat and had asked Felice to pay it. (Tr. 1447). In addition, Santos sought to offer the testimony of John Iannuzzi, an attorney who had consulted with Joseph Salvato after his indictment to testify that Salvato told him he had never been in the Alley Cat on the night of Finn's death. Judge Metzner's ruling excluding this evidence is the subject of this appeal.

ARGUMENT

The District Court Correctly Determined that the Attorney-Client Privilege Precluded Admission of Testimony of a Defense Attorney.

Santos' sole argument on appeal is that Judge Metzner incorrectly precluded Santos from calling an attorney, John Nicholas Iannuzzi, to testify about conversations that he had with Salvato after Salvato was indicted. Santos' offer of proof was that Salvato had consulted with Iannuzzi and told him that he was not in the Alley Cat bar on the night of Finn's murder. After Iannuzzi was called by the defense, Judge Metzner noted that he recognized him to be an attorney who had appeared in court on behalf of Salvato. Accordingly, a hearing was held to determine whether the communication which the defense sought to elicit fell within the attorney-client privilege. Following the hearing, Judge Metzner ruled that the communication was privileged. That determination was entirely correct.

A. There was an attorney-client relationship

Santos first attacks the District Court ruling by arguing that there was no attorney-client relationship between Salvato and Iannuzzi. This argument ignores the facts

which were before Judge Metzner when he ruled that there was an attorney-client relationship between Salvato and Iannuzzi.

On March 1, 1977, Judge Metzner conducted the first pretrial conference in this case. John Iannuzzi was present and told Judge Metzner that he had been contacted by Cabrera, Felice and Salvato and that he might represent one of them in the upcoming trial. (3/1/77 Tr. 3).^{*} Indeed, it became clear later in the hearing that Iannuzzi contemplated the possibility of representing more than one of those defendants at trial. (3/1/77 Tr. 23, 24). In addition, Iannuzzi stated that he had also conferred with Pecorino whom he had represented with respect to prior arrests. (3/1/77 Tr. 4, 32-33). Later, Iannuzzi referred to Salvato as "my man" and told Judge Metzner that he would confer with him immediately concerning the possibility of representing him. (3/1/77 Tr. 6).

Against this background, Judge Metzner was understandably concerned when Santos called Iannuzzi as a witness for the purpose of eliciting conversations between Iannuzzi and Salvato. In an effort to determine whether there was an attorney-client relationship between Salvato and Iannuzzi, Judge Metzner ordered the Government to produce Salvato for examination on the issue. (Tr. 1414).

^{*} Mr. Iannuzzi's firm had already appeared twice in this case. First, on February 10, 1977, when the Government arrested Joseph Pecorino, Philip Felice, Carlos Cabrera and Louis Santos and brought them before a United States Magistrate in the Southern District of New York in order to set bail, Pecorino, Felice and Cabrera were represented by Hugh Levine of John Iannuzzi's law firm. After the Indictment in this case was filed, on February 24, 1977, Hugh Levine on behalf of John Iannuzzi, represented Pecorino, Cabrera and Felice at the arraignment on the indictment.

When Salvato appeared, he was placed under oath and examined by both Santos' attorney and the Government. Salvato attested that he was represented not only by Daniel Meyer, his court appointed attorney, but also by Iannuzzi, whom he had consulted without payment. (Tr. 1414-15). In explaining his prior relationship with Iannuzzi, Salvato testified that Iannuzzi had represented him with respect to the conviction for which he was presently serving time and that he had paid Iannuzzi in relation to that representation. (Tr. 1415-16).

Salvato added that after he was arraigned and after he had been given the appointment of Mr. Meyer as his counsel, he spoke to Iannuzzi three or four times in the Metropolitan Correction Center about the facts of the charges pending against him. (Tr. 1417). Indeed, Salvato had asked Iannuzzi to visit him at the MCC in order to obtain legal advice and it was for the purposes of obtaining legal advice that Salvato discussed the facts of the case with Iannuzzi. (Tr. 1420). Salvato testified that a couple of these meetings occurred between Salvato and Iannuzzi alone, that a couple occurred between himself, Iannuzzi and Santos and that on another occasion there was a meeting between himself, Iannuzzi and a court-appointed investigator. (Tr. 1418-19). Finally, Salvato testified that he expected everything he said to Iannuzzi to remain in confidence whether or not the conversation had been in the presence of the investigator or Santos. (Tr. 1421).

No one other than Salvato testified in the matter, however, through Harold Borg, Santos' attorney, and Iannuzzi, Judge Metzner learned the following: Iannuzzi declined to talk about his conferences with Salvato because he believed them to be privileged. (Tr. 1286). Indeed, Iannuzzi told Borg about those conferences only after he was directed to do so by the Court. (Tr. 1432, 1434). Moreover, Judge Metzner learned through Santos' attorney that Iannuzzi had seen Santos during the time when

Santos was represented by Borg, his retained counsel, out of the presence of either Borg or Salvato. (Tr. 1435). Finally, Judge Metzner learned that Chester Mirsky, the attorney for Carlos Cabrera, and Cabrera spoke to Iannuzzi on one occasion and that on March 14, 1977 there was a joint conference at which the defendants Felice, Santos and Salvato were present with Iannuzzi, Meyers, court-appointed counsel for Salvato, Borg, retained counsel for Santos, and two investigators working for the defense, Addonizio and Donnel. (Tr. 1438-42).

On the basis of the foregoing facts, Judge Metzner concluded that Iannuzzi had an attorney-client relationship with Salvato. (Tr. 1444). Judge Metzner found that Salvato had previously retained Iannuzzi and had maintained a friendly relationship with him since that time. (Tr. 1442). Judge Metzner also found that Salvato looked to Iannuzzi as his lawyer even though he could not pay him and that Iannuzzi appeared willing to assume the attorney-client relationship. (Tr. 1424, 1442). In addition, Judge Metzner found that pursuant to this relationship, Salvato conferred with Iannuzzi regarding the defense of this case and otherwise sought legal advice from him. (Tr. 1443).

Moreover, Judge Metzner found that Santos' private conferences with Iannuzzi were privileged, thereby indicating that Iannuzzi had an attorney-client relationship with Louis Santos. (Tr. 1444). In support of this conclusion, Judge Metzner expressly referred to conferences which Iannuzzi had with Santos alone several times in the MCC in the absence of his retained counsel, Harold Borg. (Tr. 1443-44).

Furthermore, Judge Metzner found that the joint conferences which were conducted in this case were held at the MCC for the purposes of developing a defense strategy and that statements made during such conferences by defendants in this case were privileged. (Tr. 1443-44).

Judge Metzner noted that this case started as a joint defense (Tr. 1423) and that Iannuzzi was in an attorney-client relationship when he consulted with the defendants in this case. (Tr. 1443-44).

Thereafter, Judge Metzner ruled that statements made by Salvato were privileged whether they were made in meetings between Iannuzzi and Salvato alone, in the presence of an investigator, in the presence of Santos, or at any joint conference. (Tr. 1421, 1443-44). Santos objected to Judge Metzner's ruling only to the extent that his ruling encompassed meetings solely between Iannuzzi, Salvato and Santos. (Tr. 1444).

Thereafter, Borg asked to determine whether or not Salvato would waive his privilege. An attorney was appointed to advise Salvato as to whether he should waive the privilege, and after consulting with counsel, Salvato expressly declined to do so. (Tr. 1445, 1447).

On the record before him, Judge Metzner was entirely correct in finding that there was an attorney-client relationship between Salvato and Iannuzzi. The privilege exists:

"(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived. . . ."

⁸ *Wigmore, Evidence* § 2292 (McNaughton rev. 1961), quoted with approval in *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) and *United States v. Stern*, 511 F.2d 1364, 1367 (2d Cir.), cert. denied, 423 U.S. 829 (1975).

Under this formulation, the privilege applies if Salvato sought legal advice from Iannuzzi in his capacity as a professional legal advisor. Salvato's testimony at the hearing established this without dispute. To this effect Salvato testified that he asked Iannuzzi to meet with him for the purpose of obtaining legal advice about this case and that he discussed the facts of the case with him for that purpose. (Tr. 1419-20). Based on this testimony, Judge Metzner was entitled to conclude, as he did, that there was a relationship between Salvato and Iannuzzi which gave rise to the privilege.

Santos seems to contest this finding on the ground that Salvato did not "retain" Iannuzzi as his attorney. However, it is immaterial that Iannuzzi did not receive a fee or accept a retainer. *Robinson v. United States*, 144 F.2d 392, 405 (6th Cir. 1944), affirmed, 324 U.S. 282 (1945); *Smale v. United States*, 3 F.2d 101, 102 (7th Cir.), cert. denied, 267 U.S. 602 (1924); *Matter of Grand Jury Subpoena, etc.*, Nov. 16, 1974, 406 F. Supp. 381, 396 (S.D.N.Y. 1975). Nor can it matter, as Santos appears to suggest, that Salvato had court-appointed counsel. There is no rule limiting the privilege to consultants with one attorney at a time.

Santos also emphasizes that Iannuzzi never even made any mention that he would represent Salvato (Br. 10), apparently overlooking the pretrial conference of March 1, 1977 at which Iannuzzi repeatedly told the Court that he possibly would represent Salvato or another defendant. (3/1/77 Tr. 3, 6, 23, 24). Santos similarly argues that while Iannuzzi was present at many conferences concerning some of the defendants, he never acted as "counsel or to protect the interests of a client." (Br. 10). However, the test for the applicability of the privilege does not require the attorney to take some affirmative action on behalf of the client. He need only be consulted for the privilege to apply.

In sum, Santos makes the argument that there was no attorney-client relationship by ignoring the record

from which Judge Metzner correctly concluded that Salvato spoke to Iannuzzi for the purpose of obtaining legal advice about the defense of his case. Indeed, had Judge Metzner found no attorney-client relationship in this situation, his ruling would have been in serious derogation of the privilege.

B. The Communications Were Privileged

Santos' second position is that even if Salvato and Iannuzzi had an attorney-client relationship, the communications were not privileged. He presents three arguments in support of this position: First, that the communications had "no relevance to a fact in issue" and, therefore, were not privileged; second, that communications in the presence of Santos were not privileged; and third, that the communications were about a fraud to be committed and, therefore, were not privileged. These arguments are all advanced without support on the record or in the law.

1. The communications related to the purpose for which Salvato sought advice.

It requires little analysis to dismiss Santos' contention that the communications had "no relevance to a fact in issue. . . ." (Br. 11). This argument invokes that portion of the test which requires that privileged communications relate to the "purpose" for which the legal advice is sought. Santos attempts to distort this requirement into a test of legal relevancy. However, the applicability of the privilege depends not on "whether the fact or the statement was actually necessary or material or relevant to the subject of a consultation, but whether the statement was made a part of the purpose of the client to obtain advice on that subject." 8 *Wigmore, Evidence* §§ 2292 and 2310 (*McNaughton rev.* 1961) (emphasis in original); *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Matter of Grand Jury Subpoena, etc.*, Nov. 16, 1974, *supra*, 406 F. Supp. at 386, 392. Salvato's testimony un-

equivocally established that he discussed the facts of this case with Iannuzzi for the purpose of obtaining his legal advice. (Tr. 1420).

2. Communications in the presence of Santos were correctly held to be privileged.

Santos next argued that communications between Salvato and Iannuzzi in Santos' presence were not privi-

* While arguing that the privilege does not apply because the communication was about an irrelevant fact, Santos contends in passing that the attorney-client privilege was waived by Salvato when he accepted immunity. (Br. 11). Not surprisingly, this contention is unsupported by citations. If the import of the argument is that Salvato impliedly waived his privilege by testifying, the contention could only be made if Salvato testified about his conversations with Iannuzzi. *Wild v. Payson*, 7 F.R.D. 495 500 (S.D.N.Y. 1946); *Haymes v. Smith*, 73 F.R.D. 572, 576 (W.D.N.Y. 1976). Since Santos never even attempted to cross-examine Salvato about his conversations with Iannuzzi, he has no basis for suggesting that any implied waiver occurred here.

Santos advances a similar argument that Iannuzzi had an obligation to violate the privilege since Salvato testified falsely about his presence at the scene of the murder. (Br. 12). Apart from the absurdity of the suggestion that Salvato's testimony was false, this argument demonstrates a fundamental misunderstanding of the attorney-client privilege. Attorneys are not permitted to violate the privilege even if they conclude that they possess information which could be of value to the criminal justice system. It has long been settled that "the privilege remains an exception to the general duty to disclose . . . (The privilege) is worth preserving for the sake of [the] general policy, but it is nonetheless an obstacle to the investigation of the truth." 8 *Wigmore, Evidence* § 2291 (*McNaughton* rev. 1961 at 554); *Fisher v. United States*, *supra*, 425 U.S. at 403. "In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisors must be removed; hence the law must prohibit such disclosure except on the client's consent." 8 *Wigmore, Evidence* § 2291 (*McNaughton* rev. 1961 at 545); *In re Horowitz*, 482 F.2d 72, 81 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973); *Edney v. Smith*, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1976); *Haymes v. Smith*, *supra*, 73 F.R.D. at 576.

leged. This argument goes to that part of the test for the privilege which requires that the communication be "made in confidence."

Santos' argument blithely assumes that the mere presence of third parties automatically removes the privilege. However, the law is to the contrary. The presence of third parties destroys the privilege "only insofar as it is indicative of the intent of the parties that their communications not be confidential." *United States v. Bigos*, 459 F.2d 639, 643 (1st Cir.), *cert. denied*; *Raimondi v. United States*, 409 U.S. 847 (1972) (father); *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965) (co-defendant's attorney); *Continental Oil Co. v. United States*, 330 F.2d 347, 349-50 (9th Cir. 1964) (co-witness' attorney); *Robinson v. United States*, *supra*, 144 F.2d at 405 (spouse); *Smale v. United States*, *supra*, 3 F.2d 102; *Matter of Grand Jury Subpoena, etc.*, Nov. 16, 1974, *supra*, 406 F. Supp. at 386 (co-defendants and their attorneys; *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975); See also *United States v. Rosner*, 485 F.2d 1213, 1227 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *Transmirra Products Corp. v. Monsanto Chemical Co.*, 26 F.R.D. 572, 576 (S.D.N.Y. 1960); *Duplan Corp. v. Deering Milliken Inc.*, 397 F. Supp. 1146, 1174-75 (D.S.C. 1975).

Here, Judge Metzner was on sound ground in concluding that Salvato intended the communications to be confidential even though Santos was present. First, Salvato testified that he intended the communications to be confidential and Iannuzzi expressed his understanding of that intent by declining to disclose the conversations absent a judicial directive that he do so. (Tr. 1286). Second, Judge Metzner observed that these consultations took place during a time when it was apparent to him that the defendants were working together to plan a joint defense at the time of the consultations. (Tr. 1423,

1443-44). Indeed, Santos and Salvato were scheduled to be tried within less than ninety days after their conference on identical charges, including a charge that they conspired together. In these circumstances, Santos' presence was entirely consistent with an intention that the communications remain confidential.

In addition, Judge Metzner found that Iannuzzi was in an attorney-client relationship with all of the defendants with whom he was consulting at that time. (Tr. 1443-44). On this additional basis, the Court was required to find that the privilege applies:

"Where there is consultation among (two) clients and their (joint) counsel, allied in a common legal cause, it may reasonably be inferred that resultant disclosures are intended to be insulated from exposure beyond the confines of the group; that inference, supported by a demonstration that the disclosures would not have been made but for the sake of securing, advancing, or supplying legal representation, will give sufficient force to a subsequent claim to the privilege. *United States v. United Shoe Machinery Corporation*, 89 F. Supp. 357 (Mass. 1950) (other citations omitted)". *Matter of Grand Jury Subpoena, etc.*, Nov. 16, 1974, *supra*, 406 F. Supp. at 386.*

* The same District Court opinion also quotes the following language with approval:

"The parties were jointly indicted for a conspiracy . . . They might have employed the same counsel, or they might have employed different counsel as they did. But whether they did the one thing or the other, the effect is the same, as to their right of communication to each and all of the counsel, and as to the privilege of such communication. They had the same defence to make, the act of one in furtherance of the conspiracy, being the act of all, and the counsel of each was in effect the counsel of all. . . . They had a right, all the accused, and their

[Footnote continued on following page]

3. The communications did not relate to a fraud to be committed

Finally, Santos makes a rather confused argument that Salvato testified falsely at trial and therefore his communications with Iannuzzi were part of a fraud to be committed. This argument assumes that Salvato testified falsely, a premise refuted by the jury's verdict. The argument also mistakenly assumes that the communications with Iannuzzi were part of some scheme related to Salvato's later testimony. Santos' offer of proof established no such thing.

C. Santos Failed To Lay A Proper Foundation For Questioning Iannuzzi

Apart from the propriety of excluding Iannuzzi's testimony because it called for privileged communications, the evidence was equally excludable on the ground that Santos never confronted Salvato with his alleged statement and never gave him an opportunity to explain or deny it. After Salvato was excused as a witness and the Government had rested, as part of his defense case, Santos called Iannuzzi to testify about Salvato's alleged statement. Since Santos failed to lay a proper foundation before questioning Iannuzzi, Judge Metzner properly sustained the Government's objection. *Rule 613(b), F.R.*

counsel to consult together about the case and the defense, and it follows as a necessary consequence, that all the information derived by any of the counsel from such consultation is privileged. . . ' *Chahoon v. The Commonwealth*, 62 Va. (21 Gratt.) 822, 841-42 (1971)." *Matter of Grand Jury Subpoena, etc.*, Nov. 16, 1974, *supra*, 406 F. Supp. at 588-89.

Evid.; *United States v. Torres*, 503 F.2d 1120, 1126 (2d Cir. 1974); *Fortunato v. Ford Motor Co.*, 464 F.2d 962, 969 (2d Cir.), *cert. denied*, 409 U.S. 1038 (1972); *United States v. Hayutin*, 398 F.2d 944, 953 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968); *United States v. Rice*, 550 F.2d 1364, 1373-74 (5th Cir. 1977), appeal pending, — U.S. — (1977); *United States v. Wright*, 489 F.2d 1181, 1187 (D.C. Cir. 1973).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Of Counsel.*





AFFIDAVIT OF MAILING

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

MICHAEL D. CAREY being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the **3RD** day of **NOVEMBER, 1977**
he served a copy of the within **BRIEF**
by placing the same in a properly postpaid franked
envelope addressed:

HAROLD BORG, ESQ.
123-60 83RD AVENUE
Kew Gardens, N.Y. 11415

An deponent further says that he sealed the said
envelope and placed the same in the mail chute drop for
mailing at One St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Michael D. Carey

Sworn to before me this

3rd day of **November, 1977**

Elizabeth A. McKeever

ELIZABETH A. MCKEEVER
Notary Public, State of New York
No. 43-4629132
Qualified in Richmond County **78**
Commission Expires March 30, 1978